



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 24, 1996

Ms. D. Kay Woods
Abernathy, Roeder, Robertson & Joplin, A P.C.
P.O. Box 1210
McKinney, Texas 75069-1210

OR96-1004

Dear Ms. Woods:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 39952.

The City of Wylie (the "city") received a request for the following information relating to the annexation by the city of any properties within the City of Parker's ETJ, including a 195.6617 acre tract of land requested by William E. Campbell:

- A. Any and all Petitions for Annexation(s).
- B. Any and all Agendas and Minutes of any meetings, including Public Hearings and/or Work Sessions held by any governmental body of the City of Wylie during which meetings any annexation(s) may have been discussed.
- C. Any and all Notices of Public Hearings published giving notice of such Public Hearings to consider annexation(s) of such properties.
- D. Any Ordinance(s) and Service Plan(s) adopted by the City of Wylie relative to annexation(s) of such properties.
- E. The most recent City Limits Map of the City of Wylie.
- F. The most recent Annexations Map of the City of Wylie.

G. Any and all Annexation Ordinances which would have annexed property into the City of Wylie out of the Lewis M. Marshall Survey, Abstract 494 and the James W. Mitchell Survey, Abstract 589.

H. Any Escrow Agreements between the City of Wylie and William E. Campbell, Jr.

You state that the city will release the information responsive to requests D and G, requesting copies of ordinances. You state that the city has no documents responsive to request F. We note that a governmental body is not required to take affirmative steps to create or obtain information that is not in its possession. Open Records Decision No. 534 (1989). Therefore, the city need not respond to request F. The city also claims that it has no "available documents responsive" to request C. We are not certain what the city means by this statement. If the city intends to state that it has no documents in its possession that are responsive to request C, the city is not required to respond to that request. However, if the city is claiming that the information is in "active use," this simply permits the city to avoid unreasonable disruption of its immediate business by scheduling a more convenient, but reasonable, time to provide the information. Open Records Decision Nos. 148 (1976), 121 (1976). In other words, the information may be withheld only while in use. Gov't Code § 552.221(c); Open Records Decision No. 225 (1979). If the information is not now in active use, the city may not withhold it unless an exception to disclosure applies.¹ You claim that the remainder of the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claimed and have reviewed the documents at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

The city has submitted a copy of a petition in a lawsuit, thereby establishing the first prong of the section 552.103(a) test. We have reviewed the submitted information and conclude that it is related to the pending litigation. However, when the opposing party in litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). From information provided to this office, it appears that two categories of documents, categories B and C,

¹The same applies to minutes of meetings that were not transcribed at the time the request for information was received.

were previously disclosed to the public: notices were posted in public places or minutes were taken of public meetings. Therefore, the city may not withhold these two categories of documents under section 552.103(a). *See* Gov't Code § 552.007 (prohibiting selective disclosure of public documents). With the exception of these two categories of documents, and any other documents to which the opposing party has seen or had access, the city may withhold the requested information from required public disclosure.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 39952

Enclosures: Submitted documents

cc: Ms. Betty McMenemy
City Administrator
City of Parker
5700 East Parker Road
Parker, Texas 75002
(w/o enclosures)

²We note that the applicability of section 552.103(a) generally ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).